



Contractors in the Workplace

Some Legal, Ethical and Practical Considerations

Office of Counsel, Naval Air Systems Command



Contractors in the Workplace

Affects us every day

- ◆ **IPTs**
- ◆ **Advisory and assistance services**
- ◆ **Technical support**
- ◆ **Shared workspaces**



Contractors in the Workplace

**Remember: Contractor employees
are not Government employees**

Four Areas of Concern:

- 1. Gifts from contractors**
- 2. Use of Government resources**
- 3. Personal services**
- 4. Contractor access to non-
public
information**



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Gifts from Contractors

Gifts shall not be accepted or solicited from “prohibited sources”

- Prohibited Source includes person/company that does business or seeks to do business with Agency**

GIFT – Anything of value, but not

- Modest items of food such as donuts**
- Items with little intrinsic value such as greeting cards**
- Loans, discounts and opportunities available to the public**
- Items paid for under contract**



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Gifts from Contractors

Common exceptions -

- **\$20/\$50 exception**
- **Personal relationship**
- **“Widely attended gatherings”**
- **Social invitations from other than prohibited sources**
- **Gifts accepted under other statutory or regulatory authority**

The gift rules are not suspended because the contractor shares workspace



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Gifts from Contractors

Office Gifts

- ◆ **Solicitation of cash contributions toward special occasion gift (i.e., farewell luncheon) for Navy employee**
 - **Can't solicit from contractor employees**
 - **Can't accept cash gifts**
 - **Unsolicited, non-cash gifts subject to \$20 limitation**



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Gifts from Contractors

Gift examples:

- **Farewell gifts from contractors**
 - **\$20/\$50 rule applies**
 - **Gifts of little intrinsic value are allowed**
- **Lunches paid for by contractors**
 - **\$20/\$50 rule**
 - **Appearance issues**



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Gifts from Contractors



Solution?

- **Return the gift**
- **Pay fair market value - However, payment to contractors may raise appearance issues**
- **Perishable Gifts - the employee's supervisor or agency ethics official may direct the gift to be shared within the office or destroyed**



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Gifts from Contractors

- ◆ **Use of contractor employees as logistical support for social event**
 - **Result - contract claim or illegal voluntary services**
- ◆ **Inviting contractor employees to attend social event**
 - **Contractor can't charge time to contract**
 - **Can't use Government MWR funds to supplement contractor employees ticket**
 - **Consider appearance issues**



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Use of Government Resources

- ◆ **Contractor use of Government office space, telephone, e-mail, computers, etc.**
- ◆ **Proper use of Government equipment is governed by the terms of the contract**
- ◆ **Local instructions for use of Government property do not apply to contractor employees**
- ◆ **Contract can be written to make the same rules apply (but not sanctions for violations)**



Contractors in the Workplace Use of Government Resources

- ◆ **Awards to contractor members of IPTs**
 - **Coordinate with Contracting Officer**
 - **Honorary recognition only - certificates of appreciation but no cash awards, team shirts or other items that are purchased with government funds**



Contractors in the Workplace Use of Government Resources

◆ Contractor Identification

- **Distinct badging**
- **Marking office space**
- **Identification on e-mail address**
- **Identification when answering phone**
- **Identification when using Government letterhead**
- **Identification when using Government fax & fax cover sheet**
- **Identification on business cards**



Contractors in the Workplace Use of Government Resources

★ Endorsement of Contractor's Product

- Don't use official Government title/position**
- Avoid appearance of endorsement from display of contractor logos (coffee mugs, business cards & brochures)**

★ Character reference/letter of recommendation

- Use of Government letterhead or title/position only if based on personal knowledge gained in official capacity**
- Coordinate with Contracting Officer**



Contractors in the Workplace Personal Services

- ★ **Contractors are not Government employees**
- ★ **It is illegal to receive personal services from a contractor**
- ★ **Personal Services Contract -- any contract that, by its express terms or as administered, makes the contractor personnel appear to be Government employees**



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Personal Services

★ Key indicia of personal services contracts

1. Performance on-site
2. Principal tools and equipment furnished by the Government
3. Services are applied directly to the integral effort of the command in furtherance of its assigned function or mission
4. Comparable services are performed elsewhere in the same activity or at other activities by Government employees
5. Need for the service provided can reasonably be expected to last beyond



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Personal Services



Avoid personal services: Do not treat contractor employees as if they were Government employees:

- Do not direct step-by-step
- Do not supervise performance
- Do not “hire” or “fire” or “approve” leave
- Do not discipline
- Do not include contractors in your training classes

(unless by contract or upon advice of counsel)

- Only the Contracting Officers Representation (COR) can direct performance



Contractors in the Workplace Personal Services



- ◆ **Contractor employees may not perform inherently Governmental functions**
 - **Those functions that are so intimately related to the public interest to mandate performance by Government employee**
 - **Includes activities which require the exercise of discretion in applying Government authority or use of value judgment in making decisions**



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Personal Services



◆ Inherently Governmental functions:

– Act of governing

- Management of Government Programs
- Criminal investigations
- Judicial functions

– Monetary transactions

- Committing Government Funds such as placing orders on Blanket Purchase Agreements



Contractors in the Workplace

Non-Public Information

★ **Balancing Act**

- ◆ **protection of sensitive Government information vs. contractor's need to know**

★ **Restrictions on Government employees**

- ◆ **Procurement Integrity Act (41 USC 423)**
- ◆ **Disclosure of Confidential Information (18 USC 1905)**
- ◆ **Use of Non-Public Information (Joint Ethics Regs, 5 CFR 2635.703)**
- ◆ **Contract Restrictions**



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Non-Public Information



If contractor is given access to non-public information:

- It has now been released outside the Government and Government control**
- Contractor employees are not covered by same laws and regulations**
- Contractor employees are subject to Bribery Statutes/ Privacy Act**



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Non-Public Information



Before giving access to non-public information:

- (1) Do you have the legal right to do so?**
- (2) Do you need permission to do so?**
- (3) Is the purpose of using it within the scope of the contract?**
- (4) Is there a need to know?**
- (5) Has contractor promised not to further disclose?**
 - **in the contract**
 - **by separate agreement**



Contractors in the Workplace Non-Public Information

- ★ **Contractor's co-location can blur the distinction between Government and private sector**
- ★ **Ensure proper contractor identification when contractor is dealing with: general public, other DON activities and our own workers**
- ★ **Avoid inadvertent disclosure of non-public information to Contractor by:**
 - Distinct badging**
 - Marking of office spaces (co-location)**
 - E-mail address identifier**
 - Phone identification**
 - Business card identification**



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Non-Public Information

★ Contractor employees at sensitive meetings

- **Identify attendees**
- **Financial disclosure to determine conflicts**
- **Obtain nondisclosure agreement**
- **Prior notice to affected offerors/contractors**
- **Avoid CPAR, proprietary & source selection information**



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Practical Advice

- ◆ **Contractor employees are not Federal employees**
- ◆ **Beware of gifts from contractor employees**
 - while they may work in our spaces, they are “outside sources”, the rules for their gifts are very different than the rules for gifts between employees
- ◆ **Identify contractor employees:**
 - distinctive badges, e-mail address, answering phones, attending meetings
- ◆ **Ensure Government employees and the public understand contractor status**



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Practical Advice

- ◆ **Avoid appearances of endorsement**
- ◆ **Awards to contractors: honorary only, no cash**
- ◆ **Proper use of Government resources is governed by the terms of the contract**
- ◆ **Contractors only provide those services set forth in the contract: no other duties as assigned**
- ◆ **Respect employer-employee relationship between contractors and their employees**
 - **Do not try to influence use of “favorite”**
 - **Do not get involved in hiring, firing or discipline**



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Practical Advice



- ◆ **Safeguard proprietary, Privacy Act, and other sensitive and nonpublic information**
- ◆ **Avoid incumbent contractor unfair competitive advantage**
 - **Do not include contractor in meetings to discuss re-competition**
 - **Do not allow contractors access to planning information**



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**If anything is
questionable -
CALL OFFICE OF
COUNSEL**



Back-Up Material



Procurement Integrity Act

- ★ **Government employees**
 - ♦ **Shall not knowingly disclose procurement information before the award of a contract to which it relates**
 - ♦ **Shall not knowingly obtain procurement information before the award of contract to which it pertains**



Procurement Integrity Act

★ **Applies to:**

- ◆ **present and former officers and employees**
- ◆ **anyone who assisted with procurement**
- ◆ **anyone who had access to source selection information**



Procurement Integrity Act



★ What information is protected from disclosure?

Contractor bid or proposal information:

- cost or pricing data
- labor rates
- proprietary information
- information marked by the contractor as "Contractor Bid or Proposal Info"



★ What information is protected from disclosure?

Source Selection Information

- bid prices before bid opening
- proposed costs or prices
- source selection plans
- technical evaluation plans
- evaluations of technical proposals
- evaluations of cost proposals
- competitive range determinations
- rankings of bids, proposals or competitors
- reports of source selection panels, boards or advisory councils



★ Penalties for Violation

◆ Criminal Penalties

- 5 years
- fines

◆ Civil Penalties

- \$50K for each violation plus two times the amount of any compensation offered or received by Government employee in exchange for information



Disclosure of Confidential Information



★ **18 USC 1905**

- 1. Government employees may not divulge information received in the course of their employment or official duties**
- 2. Covers information related to: trade secrets, processes, operations, style of work, statistical data, or information relating to profit, losses or sources of income of any person, firm, partnership or corporation**
- 3. Penalty: Fine and/or 1 year in prison: must be removed from employment**



Joint Ethics Regulations

5 CFR 2635.703



★ **Use of Non-Public Information**

- **Government employee may not engage in any financial transaction using non-public information**
- **May not allow the use of non-public information for employee's private gain or for someone else's private gain**
- **Whether by advice, recommendation or unauthorized disclosure**